Hii King Hiong v Sarawak Securities Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-2–711 OF 2000
ZULKEFLI, RAUS SHARIF AND ABDULL HAMID EMBONG JJCA
14 FEBRUARY 2008

Evidence — Fresh or further evidence — Admission of fresh evidence on appeal — Principles to be applied — Whether evidence available at trial — Whether evidence had determining influence upon decision of High Court — Whether evidence satisfied requirements — Rules of Court of Appeal 1994 rr 7(3A), 28 — Courts of Judicature Act 1964 s 69

The appellant applied by way of a notice of motion for leave to admit fresh evidence in the appeal proper. The fresh evidence sought to be admitted comprised the entire oral testimonies and/or evidence as in the note of proceedings in Kuching High Court Suit No 22–11 of 1998-II. The appellant further applied for leave that he be permitted to amend his defence by pleading a counterclaim against the respondent by reason of the said fresh evidence as admitted. The appellant in his argument submitted that the application to admit fresh evidence was made under r 28 of the Rules of Court of Appeal 1994 ('the 1994 Rules').

Held, dismissing the application with costs:

(1) The application to admit fresh evidence before the Court of Appeal is to be made under the provisions of s 69 of the Courts of Judicature Act 1964 and r 7(3A) of the 1994 Rules wherein new or fresh evidence may be admitted during the hearing of the appeal provided two conditions are fulfilled which are: (a) at the hearing before the High Court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and (b) the new evidence if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court (see para 4).

(2) On the facts, the appellant had not shown the factual circumstances as to how the said two conditions had been satisfied. The appellant also had not shown how the fresh evidence in the form of the notes of proceedings in Suit No 22–11 of 1998-II which was not consolidated with the other four cases sought to be admitted as evidence would have a determining influence upon the decision of the High Court. Thus, taking into consideration of the fact that the trial in the action under appeal herein had come to a final conclusion, the appellant's application that he be permitted to amend his defence by pleading a counterclaim against the respondent by reason of the said fresh evidence as admitted could not be allowed (see paras 5–6).

[Bahasa Malaysia summary

Perayu melalui notis usul memohon untuk kebenaran untuk mengemukakan keterangan baru dalam rayuan sebenar. Keterangan baru yang dipohon untuk dikemukakan terdiri daripada keseluruhan testimoni lisan dan/atau keterangan seperti di dalam nota prosiding di Mahkamah Tinggi Kuching Guaman No 22–11 Tahun 1998-II. Perayu seterusnya memohon kebenaran agar beliau dibenarkan meminda pembelaannya dengan memplid satu tuntutan balas terhadap responden disebabkan oleh keterangan baru yang dikemukakan. Perayu dalam hujahannya menyatakan bahawa permohonan untuk mengemukakan keterangan baru dibuat di bawah k 28 Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah-Kaedah 1994').

Diputuskan, menolak permohonan dengan kos:

(1) Permohonan untuk mengemukakan keterangan baru di Mahkamah Rayuan perlu dibuat di bawah peruntukan s 69 Akta Mahkamah Kehakiman 1964 dan k 7(3A) Kaedah-Kaedah 1994 di mana keterangan baru boleh dikemukakan semasa perbicaraan rayuan dengan syarat dua syarat-syarat berikut dipenuhi iaitu: (a) semasa perbicaraan di hadapan Mahkamah Tinggi keterangan baru tidak dikemukakan kepada pihak yang memohon untuk menggunakannya, atau melalui ketekunan yang munasabah tidak dapat disediakan; dan (b) keterangan baru itu jika benar, mempunyai atau berkemungkinan mempunyai pengaruh penentu terhadap keputusan Mahkamah Tinggi (lihat perenggan 4).

(2) Atas fakta, perayu tidak menunjukkan keadaan fakta bagaimana kedua-dua syarat tersebut telah dipenuhi. Perayu juga tidak

menunjukkan bagaimana keterangan baru dalam bentuk nota prosiding dalam Guaman No 22–11 Tahun 1998-II yang tidak digabungkan dengan empat kes lain yang dipohon untuk diterima sebagai keterangan boleh menjadi pengaruh penentu terhadap keputusan Mahkamah Tinggi. Oleh itu, dengan mengambilkira fakta bahawa perbicaraan dalam tindakan di bawah rayuan ini telah tiba kepada suatu keputusan muktamad, permohonan perayu agar dibenarkan meminda pembelaannya dengan memplid tuntutan balas terhadap responden atas sebab keterangan baru tersebut seperti yang dikemukakan tidak boleh dibenarkan (lihat perenggan 5–6).]

Notes

For cases on admission of fresh evidence on appeal, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1534–1549.

Cases referred to

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (distd)

Sarawak Securities Sdn Bhd v Ting Eng Eng & Hii King Hiong Kuching High Court Suit No 22–11–98-II (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69
Rules of the Court of Appeal 1994 rr 7(3A), 21, 28
Rules of the High Court 1980

Appeal from: Civil Suit No 22–13 of 1998–I (High Court, Kuching)

Tai Choi Yu (Tai Choi Yu & Co) for the appellant.
Tony Ling (HC Lee & Partners) for the respondent.

Zulkefli JCA (delivering judgment of the court):

[1] This is the appellant's ('the defendant in the court below') application by way of notice of motion in encl (13a) for leave to admit fresh evidence in the appeal herein comprising of the entire oral testimonies and/or evidence as in the notes of proceedings in Kuching High Court Suit No 22–11 of 1998-II between *Sarawak Securities Sdn Bhd v Ting Eng Eng & Hii King Hiong; Daniel Wong Jit Kiang, as third party; and Jacqueline Ngu (f), as fourth party* that took place between 14 November 2005 to 4 December 2006 which

A resulted in the settlement of the action. The appellant further applies for leave that he be permitted to amend his defence by pleading a counterclaim against the respondent ('the plaintiff in the court below') by reason of the said fresh evidence as admitted.

B **[2]** The appellant in his affidavit in support of the application, inter alia, stated the following grounds:

(1) The fresh evidence in the aforesaid Kuching High Court Suit No 22–11 of 1998-II has the same factual basis as that on which the appellant was
C sued under the Kuching High Court Suit No 22–13 of 1998-I, which is the action under appeal herein.

(2) The action under appeal herein was consolidated at the same hearing with three other cases involving the same plaintiff but with different defendants.

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(3) In the trial of this action in the Kuching High Court the appellant was barred and/or disallowed to call certain witnesses called by the respondent and other defendants and from cross-examining the said witnesses as they were also witnesses in other cases consolidated under
E the same hearing.

(4) The fresh evidence was never brought before the Kuching High Court's hearing of this action and if the said evidence was available, the said trial judge would not have acted as he had or that judgment would have been given against the appellant but rather in favour of the appellant.

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[3] We heard this application on 30 July 2007 and we were unanimous in our decision dismissing the application. We now give the reasons for our decision as follows.

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[4] Learned counsel for the appellant in his argument before us submitted that the application to admit fresh evidence is made under r 28 of the Rules of the Court of Appeal 1994 ('the 1994 Rules'). He further submitted that the appellant's application if allowed will require consequential amendment of the record of appeal which is made under and by virtue of r 21 of the 1994
H Rules. The case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 was cited as an authority for the appellant to support such a contention. Contrary to the contention of learned counsel for the appellant, it is our considered view that the application to admit fresh evidence before the Court of Appeal is to be made under the provisions of
I s 69 of the Courts of Judicature Act 1964 and r 7(3A) of the 1994 Rules

wherein new or fresh evidence may be admitted during the hearing of the appeal provided two conditions are fulfilled which are as follows:

(a) at the hearing before the High Court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the new evidence if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court.

[5] We do not find the case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari Bin Abdul Rahman* cited by the appellant is of relevant here because that case did not deal at all with the issue of admission of fresh evidence. Moreover in the affidavit in support of the appellant's application the appellant has not shown the factual circumstances as to how the two conditions under r 7(3A) of the 1994 Rules have been satisfied. The appellant merely alleged that his counsel was barred or prevented by the trial judge to call certain witnesses called by the plaintiff and other defendants and from cross-examining the witnesses in the said four consolidated suits. The appellant has also not shown how the fresh evidence in the form of the notes of proceedings in Suit No 22–11 of 1998-II which was not consolidated with the other four cases sought to be admitted as evidence would have a determining influence upon the decision of the High Court.

[6] In one of the prayers under the application to admit fresh evidence the appellant had also sought an order that he be permitted to amend his defence by pleading a counterclaim against the respondent by reason of the said fresh evidence as admitted. We do not think this prayer can be allowed taking into consideration of the fact that the trial in the action under appeal herein had come to a final conclusion.

[7] The appellant has also alleged in support of his application to admit fresh evidence that by consolidating the four cases together the trial judge had made an error in law in civil procedure and that this had prevented his counsel from exercising his right to apply for third party proceeding under the Rules of the High Court 1980. On this point we find if at all there is a merit in this argument the appellant could still argue on this issue as a ground at the stage of the appeal herein. Nevertheless the appellant cannot use this as a valid ground to support his application to admit fresh evidence.

A **[8]** For the reasons above stated, we dismissed the appellant's application in encl (13a) with costs.

Application dismissed with costs.

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Reported by Brendan Navin Siva

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